KUAN KWAI CHOI

v.

STANDARD CHARTERED BANK

COURT OF APPEAL, BRUNEI DARUSSALAM
TI LIANG YANG P
[CIVIL APPEAL NO. 2 OF 1990]
28 & 30 MAY 1991

LAND LAW: *Two overdraft facilities - Amalgamated - Secured by power of attorney - Memorandum of charge - Default - Respondent obtained order for possession - Whether charge revoked power of attorney - Whether Land Code makes provision for registration of power of attorney - Unregistered memorandum of charge - Effect of - Whether application for possession to be made to Land Office or Court - Sale by respondent in owner's name - Land Code [Brunei], s. 25(1).*

In November 1986, the appellant agreed to amalgamate 2 overdraft accounts totalling $400,000 which had been granted by the respondent bank. The facility was secured by a power of attorney, which included an irrevocable power to the respondent *inter alia* to exercise all rights and privileges and to perform all duties in the event of a default. These rights were to be exercisable over 2 parcels of land (the said land).

On 6 October 1988, in consideration of the same overdraft facility, the appellant also signed a memorandum of charge in respect of the said lands. The appellant defaulted in repayments and the respondent sought to recover possession of one of the lots in pursuance of the power of attorney.

The appellant opposed the bank's application on the following grounds:

(1) The Land Code makes no provision for the registration of powers of attorney; and

(2) The memorandum of charge remained unregistered and therefore the power of attorney was an "interim security" providing equitable mortgage rights over the property.

The appellant argued therefore that the respondent should apply to the Land Office and not the Court if it wishes to enforce the power of attorney. In other words, that the memorandum of charge revoked the power of attorney. The Chief Registrar had granted the bank's application. The appellant's appeal to the Commissioner was dismissed. This is the appeal against that dismissal.

Held:

The bank has no right to possession under the power of attorney and it was not necessary for the bank to obtain vacant possession against the defendant before sale nor does the bank have any right in itself to possession against her. Any sale which the bank might make by virtue of the powers conferred by the power of attorney would be a sale by the bank in the name of the defendant. Only when the bank came to sell the land might the arguments put forward by the appellant become relevant.

[Appeal allowed; Order of possession set aside.]

Legislation referred to:

Land Code [Brunei], ss. 23, 25(1)

For the appellant - in person.
For the respondent - Angking Embah; M/s. D.F. Abang Zen

JUDGMENT

Ti Liang Yang P:

This is an appeal from a decision of Mr. Commissioner Jones on 28 July 1990, dismissing an appeal from the Chief Registrar who had granted the application of the Standard Chartered Bank for possession of land in Kuala Belait in the exercise of powers contained in a power of attorney dated 6 December 1986. The application was by way of originating summons, in which the appellant was named as the defendant.

In November 1986, the appellant agreed to amalgamate two overdraft accounts totalling $400,000 which had been granted by the respondent. The facility was secured by a power of attorney para. 3 of which provided an irrevocable power for the respondent, in the event of default in payment, *inter alia* "to exercise all rights and privileges and perform all duties" belonging to the registered owner of two parcels of land, namely Lot 814 in Mukim Kota Batu and Lot 3771 at Kuala Belait.

On 6 October 1988, in consideration of the same overdraft facility, the appellant also signed a memorandum of charge in respect of these two properties.

As at 31 August 1989, the appellant was in breach of her covenant to repay advances by the respondent in the sum of $405,954 including interest.

In the originating summons the respondent sought to recover possession of Lot 3771 in pursuance of the power of attorney. The appellant opposed the bank's application on grounds which she has repeated before Mr. Commissioner Jones and this Court. She submits that the Land Code makes no provision for the registration of powers of attorney. A memorandum of charge may be registered under s. 23 of the Land Code subject to the approval of His Majesty in Council. The 1988 memorandum of charge is still unregistered and therefore, she argues, the power of attorney is an "interim security" providing equitable mortgage rights over the property. It follows, she submits, that in accordance with para. 5 of the power of attorney the respondent must apply to the Land Office, not the Court, if it wishes to enforce the power of attorney.

Paragraph 5 empowers the respondent:

> In default of payment of the said facilities or any part thereof which has been utilised or of the interest due thereon by my said firm and without notice to me, to sell assign transfer to grant lease, licence or otherwise dispose of any part or parts of the said properties as my attorney shall deem fit and in accordance with the provisions of the Land Code, Cap. 40.

Section 25(1) of the Land Code deals with the realisation of a charge and provides:

> If any Land Officer is satisfied that default has been made in the payment of any sum whether principal or interest secured by any charge and that 2 months notice demanding payment has been given by the chargee, he may order the sale of the land charged, provided that no such sale shall be carried out until reasonable notice has been given to all persons who would be affected by such sale.

The appellant's alternative argument is that by implication the execution of the memorandum of charge revoked the power of attorney. She does not say why this should be so.

Thus the appeal was presented both to the Judge in chambers and to this Court on the basis that the power of attorney was in reality a charge upon the land and that sale could be effected only in accordance with the provisions of the Land Code. With respect this argument and all the proceedings below, it seems to us, went forward on a misunderstanding

of the nature of the application which was before the Chief Registrar. The bank sought an order for possession and cited only the owner as defendant. Even assuming that the owner were in possession, we think the bank has no right to possession under the power of attorney. The bank relies on clause 1 which is in these terms:

> to manage the said properties in such manner as my attorney shall think fit and as fully and as effectually as I myself might or could do if personally present or acting.

Naturally the bank did not want to sell with sitting tenants, and that clause justified the service of notice to quit on the occupiers, but it was not necessary for the bank to obtain vacant possession against the defendant before sale nor does the bank have any right in itself to possession against her. Any sale which the bank might make by virtue of the powers conferred by the power of attorney would be a sale by the bank in the name of the defendant. Only when the bank came to sell the land might the matters which were argued below become relevant.

The point we have now raised was not considered below, but we think that the proceedings were misconceived and that we should reverse the Commissioner's order.

The appeal is allowed and the order for possession set aside.

Also found at [1991] 3 CLJ 1917

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